

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

United States Court of Appeals for the Second Circuit

76-7181

DOCKET NO.

ALBERT E. McFERRAN, JR., (PRO SE),
Plaintiff-Appellant.

-against-

BOARD OF EDUCATION FOR THE ENLARGED
CITY SCHOOL DISTRICT OF TROY, NEW YORK,
and EWALD B. NYQUIST, COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK,
Defendants-Appellees

B
P/S

Appeal From The United States District Court
For The Northern District of New York
75-CV-265

BRIEF OF APPELLEE BOARD OF EDUCATION

GEORGE S. LETTKO
Attorney for Appellee
BOARD OF EDUCATION
Office Address
5 First Street
Troy, New York 12180
Telephone: (518) 273-8152



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* * (Please note Agreement is in Addendum of this brief since substantial provisions thereof are omitted from Appellant's Appendix)

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NATURE OF THE CASE
AND
STATEMENT OF FACTS

This is an appeal by a tenured teacher, ALBERT E. McFERRAN, JR., from Order and Judgment dated February 26, 1976 of the United States District Court for the Northern District of New York (Honorable James T. Foley, Chief Judge) dismissing said teacher's Complaint pursuant to the terms of a Compromise and Settlement Agreement that agreed to its discontinuance; and denying said teacher's request for the convening of a three-Judge Court. (Record 268-276; Appendix 9+)

The Compromise and Settlement Agreement ("Agreement") (Record 54-68; comprising BOARD'S Exhibits I, II, III, IV & V) was reached in a formal hearing on charges under section 3020-a of the Education Law of New York after hearings had been held on three prior days in June 1975 and after the teacher, MR. McFERRAN, had procured an attorney, Michael G. Breslin, Esq., who negotiated such settlement with the BOARD OF EDUCATION'S representatives and who himself read such Agreement into the Record of the hearing on July 11, 1975 (Record 74-86; 87-110; BOARD'S Exhibits VI & VII). The teacher MR. McFERRAN and his attorney Michael G. Breslin, Esq. then both asserted on the Record of this hearing that they agreed to it, and such Agreement was then and there executed at the hearing before the hearing officer who took the acknowledgment of the respective signatures of the parties and their attorneys. (Record 105; 87-110; Cf. Charges, Record 139-145, and BOARD'S resolution of probable cause, Record 13-17) (Record 54-60)

Said Agreement after reciting a brief background contains an express formal stipulation (Record 54, 55, 56 & 57, also in

(STATEMENT OF FACTS CONT'D)

Addendum to this brief) among others that MR. McFERRAN'S civil action 75-CV-265 in the United States District Court, Northern District of New York, "shall be immediately discontinued on the merits and with prejudice, without costs". (p.61 Addendum this brief)

Such Agreement dated July 11, 1975 and resolutionized by the BOARD OF EDUCATION on July 15, 1975, postdated the teacher MR. McFERRAN'S commencement of the above entitled action as against the appellee COMMISSIONER OF EDUCATION on May 28, 1975 and as against the appellee BOARD OF EDUCATION on June 24, 1975 in which the teacher's lengthy Complaint, asserting jurisdiction pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §1983, claimed that section 3020-a of the Education Law was unconstitutional in denying plaintiff due process of law and sought to have enforcement of this section permanently enjoined, and requested the convening of a three-Judge Court, and an order reinstating him as a teacher in the appellee BOARD OF EDUCATION'S public school system, and demanded damages. (Record 12; 1-32; 269, 268-274) (Record 61-68)

The BOARD OF EDUCATION had made a motion on July 2, 1975 to dismiss the teacher's Complaint in 75-CV-265. But the settlement Agreement was executed thereafter on July 11, 1975 and resolutionised by the appellee BOARD OF EDUCATION on July 15, 1975. When the tenured teacher MR. McFERRAN would not permit his attorney as of September 12, 1975 to make and file a stipulation of discontinuance on the merits of the above entitled action 75-CV-265 in the United States District Court, and instead terminated his said attorney on said date, and announced such

(STATEMENT OF FACTS CONT'D)

termination of his attorney in open Court on September 15, 1975, the appellee BOARD OF EDUCATION made a supplemental motion returnable November 3, 1975 placing before the United States District Court the above settlement Agreement wherein the teacher MR. MCFERRAN and his attorney expressly, formally and solemnly stipulated to discontinue on the merits and with prejudice the pending Federal Court action 75-CV-265. (Record 36, BOARD'S first motion dated 7/2/75; Record 38-53 and Exhibits I through VII, Record 54-100; see also Agreement in Addendum to this brief since appellant omitted substantial provisions therefrom in his Appendix) (pp. 58-64, Addendum, this brief)

Although the tenured teacher's Complaint attaches a copy of the appellee BOARD OF EDUCATION'S formal resolution in Executive Session dated May 5, 1975 pursuant to section 3020-a(2) of the Education Law setting forth the BOARD'S determination of probable cause as to each of the three separate Charges (Record 13-22), and imposing the suspension of 3020-a(2) (Record 16), the teacher, MR. MCFERRAN, failed to include therein the detailed Specifications of such Charges which are therein recited as "annexed hereto". Such Specifications of Charges were submitted to the District Court on the day of oral argument on December 1, 1975 as part of the BOARD'S "additional papers" (Record 139-145; BOARD'S Exhibit XII) which also included the BOARD'S Exhibit XIII, written report dated March 21, 1975 of the BOARD'S psychiatrist Dr. Walter A. Osinski, M.D. (Record 146-154). This report of Dr. Osinski, up to the time said teacher refused to cooperate in February 1975, formed the basis of some of such Specifications of Charges. In the Agreement, the teacher declares no contest of the Charges made against him (Record 58; 54-60, Agreement p. 5, Addendum to this brief; Record 146-154) (transcript in Record 105, 102, 96-110; 61-68)

(STATEMENT OF FACTS CONT'D)

(The Court's attention is respectfully invited to a separate Index to appellee BOARD OF EDUCATION'S Exhibits and documents with their corresponding pages in the Record, such Index appearing immediately after the Table of Contents at the beginning of this brief, and said Exhibits are identified in such Index.) (Note: Full Agreement not in Appendix -- see Addendum this brief)

The 3020-a hearing of said tenured teacher, based on said Charges including incompetency and/or mental disability, insubordination, and conduct unbecoming a teacher, and based upon said detailed Specifications, was held on June 11, June 19 and (Record 54) June 23, 1975/as of which time, the teacher MR. McFERRAN, conducting his own cross-examination of the Superintendent Sidney L. Johnson, expressly requested an adjournment of two weeks to obtain counsel (Record 74-86). This request was granted until July 11, 1975 with direction by the hearing officer that the hearing would continue on July 11 and July 12, 1975. As of this posture of the 3020-a hearing much testimony had been received and many exhibits admitted and the BOARD'S psychiatrist, Dr. Osinski and the BOARD'S negotiator, Mr. McGinn, had been waiting to be called as additional witnesses in support of the Charges and to be open for cross-examination by the teacher MR. McFERRAN (Record 38-53, moving affidavits of BOARD'S Superintendent Sidney L. Johnson and BOARD'S attorney George S. Lettko). (Cf. Record 107) (Record 77-79)

After the settlement Agreement was resolutionised by the appellee BOARD OF EDUCATION on July 15, 1975 the teacher's status was automatically transformed under said Agreement effective

(STATEMENT OF FACTS CONT'D)

July 11, 1975 from one of suspension with pay under 3020-a of the Education Law to one of sick leave (Record 56, 54-68; and BOARD'S Resolution dated May 5, 1975 attached to Complaint, imposing suspension with pay under 3020-a(2)(in Record, 16, 13-17) and the teacher MR. McFERRAN did proceed to submit to his own psychiatrist, Dr. Henry A. Camperlengo, M.D., for examination, and said Dr. Camperlengo did send an undated statement to the BOARD OF EDUCATION'S office received on September 2, 1975 stating his "considered medical opinion that he (said teacher) can function in his professional role as teacher at this time", (Record 47). (Also Agreement p. 3 in Addendum of this brief)

However the teacher MR. McFERRAN willfully declined to submit to further evaluation by the BOARD'S psychiatrist, Dr. Osinski, as required under the Agreement of July 11, 1975 (Record 116, 117; 113-118) and has continued in his willful refusal to submit to further evaluation by the BOARD'S psychiatrist Dr. Osinski, and has even rejected the BOARD OF EDUCATION'S informal offer (Record 171, see Pages 13 through 15 of BOARD OF EDUCATION'S brief dated February 2, 1976; Record 180-181). (Cf. Record 105, 95, 90-110; 61-68; 54-60)

On the other hand MR. McFERRAN has accepted sick leave benefits under said Agreement consisting of sick leave pay from September 1, 1975 through June 15, 1976 (totalling in all
(1)
\$15,250.66) which said teacher has exhausted (Record 170, Page 5,

(Footnote:

(1) This amount is taken from the Superintendent's computation as set forth in the teacher's later State Supreme Court action. Both of his State Court actions as to the Board of Education resulted in orders of dismissal dated July 2, 1976 and October 15, 1976 (with appeal pending) on the ground of other action pending in the U.S. Court of Appeals.

(STATEMENT OF FACTS CONT'D)

footnote, of his attorney Joan Goldberg's memorandum).

Chief Judge James T. Foley's decision (Record 268-274; Appendix 9+) sets forth on Page 2 thereof the delays of which a majority were attributable to MR. McFERRAN'S request for time to obtain a lawyer and further request to file papers pro se even after his lawyer, Joan Goldberg, entered the case and made submissions on his behalf (Record 168; 172-267). The teacher MR. McFERRAN failed to serve upon the undersigned a corresponding set of the pro se papers which he filed with the Court below on February 23, 1976 which were inspected by the undersigned at the Clerk's Office of this United States Court of Appeals.

Under the settlement Agreement of July 11, 1975 the teacher and the BOARD OF EDUCATION also stipulated to discontinue the pending 3020-a proceedings -- which had been roughly half completed -- and the acknowledgment by the hearing officer both on the Record on July 11, 1975 and upon receipt of the BOARD'S certified resolutions of July 15, 1975 made it an accomplished fact (Record 108; 68). There was no 3020-a proceeding pending any longer after the Agreement was read into the Record and executed on July 11, 1975 and the BOARD duly enacted the authorizing resolution on July 15, 1975. (Record 105, 90-110; 61-68;54-60)

The teacher also agreed in such settlement Agreement to discontinue appeal No. 10416 to the COMMISSIONER OF EDUCATION relating to his alleged suspension of January 8, 1975 and the BOARD'S resolution of January 14, 1975 for his psychiatric examination under section 913 of the Education Law "...together with any related grievance ..." (Record 54-68; and BOARD'S Exhibit XVI

(STATEMENT OF FACTS CONT'D)

showing resolution of 1/14/75, attached to Record 171). (Also Record 239-242) (Agreement p. 4 in Addendum, this brief)

Accordingly, the settlement Agreement of July 11, 1975:

1. Discontinued the said 3020-a proceeding on the merits (but subject to re-opening as therein stated). (Record 58; Addendum p. 62 this brief)

2. Immediately transformed the teacher's status from that of suspension under 3020-a to that of sick leave pending certification by his doctor and the BOARD'S doctor that he has a mental capacity to perform his duties at which time he would be reinstated and if either doctor felt in certifying that further treatment was needed, this would be a condition of certification and reinstatement to duty. (Addend p.60)

3. Discontinued his above entitled Federal Court action 75-CV-265 on the merits and with prejudice immediately. (Record 56-57; Addendum pp. 60-61, this brief)

4. Discontinued his appeal dated January 31, 1975, No. 10416 to the COMMISSIONER for his alleged suspension of January 8, 1975 etc. on the merits "...together with any related grievance...". MR. McFERRAN in his submittals in the Record and in his brief vehemently argues the subject matter of said appeal No. 10416 which he formally stipulated to discontinue on the merits in said Agreement. (Record 57, Addendum p.61)

5. MR. McFERRAN was to make written retraction of accusations and deliver valid releases -- which

(STATEMENT OF FACTS CONT'D)

has not been done. (Record 54-60) (Addend. pp 61-62)

6. Declares that the teacher does not contest the Charges made against him. And other provisions.

Included in the subject matter of the teacher MR. McFERRAN'S appeal No. 10416 to the COMMISSIONER -- which he stipulated to discontinue on the merits in the Agreement of 7/11/75 -- was a confrontation that took place on January 8, 1975 by the teacher with the BOARD OF EDUCATION'S Superintendent of Schools, Sidney (1) L. Johnson, who was then the Chief Executive Officer under section 2508 of the Education Law (compare BOARD resolution of January 14, 1975-Record 171 attaching same; also Record 238-242; Appendix 1; Record 229-230; Cf. 227, and those papers under Record 230-240 showing reference to hearing of December 4, 1974 before committee of the BOARD). (Cf. Record 227,224)

The Superintendent of Schools was a direct witness to the disturbed conduct of the teacher MR. McFERRAN to the point that he would not entrust children to his care. Pursuant to section 2508(5) of the Education Law, the Superintendent temporarily suspended the teacher MR. McFERRAN from his teaching duties, made a report to the BOARD OF EDUCATION whose committee had previously listened to MR. McFERRAN on December 4, 1974 in a three hour session. (Same references as next above)

The BOARD'S aforesaid resolution of January 14, 1975 directed the examination of said teacher MR. McFERRAN by the BOARD'S psychiatrist Dr. Osinski, stating the reasons, and giving the (Footnote:(1) Mr. Johnson is now Superintendent of the Syracuse City School District.)

(STATEMENT OF FACTS CONT'D)

teacher notice of the reasons, and by the letters attached to BOARD'S Exhibit XVI (Record 171 attaching same, Cf. Record 238-242) gave said teacher the opportunity to discuss the reasons. The temporary suspension specified in the resolution was with pay.

After Dr. Osinski's written report of March 21, 1975 was received, two separate meetings were set up for MR. McFERRAN to meet with the BOARD members to discuss Dr. Osinski's report and whether he would agree to seek psychiatric assistance on his own. (See Specifications of Charges Nos. 1 through 9, signed by the Superintendent Sidney L. Johnson, Record 139-140; Cf. Record 27-30; 125) MR. McFERRAN refused to meet with the BOARD. (Record 27-30)

COMMISSIONER'S Decisions No. 9032, 14 Ed Dept Rep 390, June 9, 1975 and No. 9033, 14 Ed Dept Rep 391, show some of the background to the teacher MR. McFERRAN'S 3020-a charges and his attempt to halt the hearing before commencing his above Federal Court action 75-CV-265. (Cf. McFerran's letter to Judge Foley dated Dec. 31, 1975, near Record p. 168, as to above #9032 and #9033; Cf. Complaint, Record 29, 27-30) (Cf. Record 161-163)

The teacher MR. McFERRAN refers to COMMISSIONER'S Decision No. 8608 (12 Ed Dept Rep 197-199; Pages 3, 4 and 11 of his brief in this Court, Cf Record 195-196; 174). But not mentioned by said teacher regarding said COMMISSIONER'S Decision dated February 26, 1973 is the fact that MR. McFERRAN was then represented by an attorney, Richard Doling, Esq., as the official report shows, and did not appeal by way of Article 78 proceeding to review said Decision. (Cf. Record 174) Nor does MR. McFERRAN state that he

(STATEMENT OF FACTS CONT'D)

withdrew his Summer School appeal No. 9989 to the COMMISSIONER in March 29, 1973. (Record 145, Charges p. 7, item 12)

A reading of the teacher MR. McFERRAN'S memorandum of law submitted by his attorney Joan Goldberg to the District Court below (Record 170) shows that there is no contention or claim of coercion as to the settlement Agreement, but does show an attack on section 3020-a of the Education Law and an attack on the settlement Agreement on other grounds.

The Record shows that when the teacher MR. McFERRAN pursued his Complaint in the District Court below (Record 124, 119-126) he attempted to expand the Complaint (Record 124) "to include statements relative to the 3020-a proceeding, the refusal of said COMMISSIONER OF EDUCATION to act as requested ... * * * "

-- matters which the teacher in such settlement Agreement had already discontinued on the merits (compare Record 54-60 with Complaint 1-32 and 124-126). (Record 95-110; 68)

In other words, the teacher by virtue of such settlement Agreement had affirmatively discontinued three separate matters, to wit, his action in the District Court 75-CV-265, and his appeal to the State COMMISSIONER OF EDUCATION No. 10416 based on his alleged suspension of January 8, 1975, and the 3020-a proceeding that had progressed to the fourth hearing day. The record shows that each of the said three matters drew his substantial attention in his District Court action by the time of his voluminous submission on February 23, 1976 (Record 172-267). (Record 162)

The briefs filed on behalf of the teacher MR. McFERRAN attack the Agreement as invalid on three grounds:

(STATEMENT OF FACTS CONT'D)

1. It is illusory.
2. The BOARD OF EDUCATION was legally incompetent to make it.
3. No consideration was given to the teacher.

(Record 269, 268-274; Appendix 9+, p. 2 Dist. Ct. Decis.

Cf. Record 170, attorney Goldberg's brief, pp. 2-3)

Both the brief filed by the teacher's attorney Joan Goldberg, and the further papers filed by the teacher pro se also reallege the constitutional challenges made in the Complaint.

The District Court below emphasized that its Decision will be primarily concerned with the enforcement of the Agreement discontinuing this instant litigation, but that a limited consideration will be given to the constitutional issues in light of recent Federal Court decisions. (Appendix 9+, p. 2; Record 269, 268-274).

The District Court's Decision, after addressing each of the challenges or attacks of the teacher and his new attorney Joan Goldberg, concludes that the Agreement was a fair and sensible effort to terminate the numerous proceedings in which the parties were engaged, and dismissed the Complaint pursuant to the terms of the Agreement that agreed to its discontinuance. (Appendix 9+, p. 7) (Record 268-274)

Present Status Of Teacher -- Not In Record

The teacher MR. McFERRAN is still a tenured teacher of the BOARD OF EDUCATION'S school district who is still in the status of sick leave. The teacher received his full pay until placed on

(Present Status Of Teacher -- Not In Record, Cont'd)

(1) sick leave under the Agreement. He has received his accrued sick leave pay from September 1, 1975 through June 15, 1976 totalling \$15,250.66 and has exhausted the same.

The BOARD OF EDUCATION is prepared to reinstate the teacher MR. McFERRAN to duty as soon as it receives the certification from its doctor under this Agreement with the understanding that the teacher's other fulfillments thereunder will be supplied.

(Footnote:

(1) This full pay covered up to the conclusion of the regular school year in June 1975; and there was no pay due between June 1975 and the settlement of July 11, 1975 when sick leave status became effective.

QUESTIONS PRESENTED

1. Where section 3020-a Education Law proceedings against a tenured teacher have proceeded on three hearing days, may the BOARD OF EDUCATION and the teacher validly compromise and settle such 3020-a proceedings based on a fair Agreement negotiated by his attorney and expressly agreed to and signed by the teacher and his attorney after reading it into the record?

2. Where such settlement Agreement also formally stipulates to immediately discontinue with prejudice the tenured teacher's pending District Court action challenging that very 3020-a proceeding, and the Court examines its terms and surrounding circumstances and finds it to be fair, was the action of the Court in approving same and granting the discontinuance proper?

3. Should such discontinuance of his action be upheld regardless of a change of heart by the teacher who, after achieving discontinuance on the merits of the 3020-a Charges and proceedings and placement on sick leave with benefits, claims coercion and discharges his attorney with whom he signed the Agreement?

4. Should it be upheld even though the teacher refuses to submit to further evaluation by the BOARD'S psychiatrist as required under the Agreement in order to be certified to resume the performance of duties?

ARGUMENT

POINT I

THE COMPROMISE AND SETTLEMENT AGREEMENT ("AGREEMENT") OF JULY 11, 1975, FULLY EMBRACING THE TENURED TEACHER'S THREE SEPARATE PROCEEDINGS INCLUDING THE ACTION BELOW, IS VALID, REAL, SUPPORTED BY CONSIDERATION, AND ITS FORMAL STIPULATIONS SOLEMNLY ENTERED INTO, READ INTO THE RECORD, ASSENTED TO AND SIGNED BY THE PARTIES AND THEIR ATTORNEYS, SHOULD BE UPHELD.

The setting for the Agreement was the ongoing status of three separate proceedings, namely (1) the §3020-a Education Law proceeding past its third hearing date, (2) the teacher's pending appeal pursuant to §310 of the Education Law to the State COMMISSIONER OF EDUCATION and (3) the teacher's pending District Court action, 75-CV-265 attacking that very 3020-a proceeding and charges against him on alleged grounds of unconstitutionality and violation of civil rights.

(Agreement; Record 54-68, 87-110; 57, par. 5 & 6; 56 Par. 4; Complaint, Record 1-32, Cf 162) (Agreement on pp. 58-64, Addendum this brief)

The transcript was already over 400 pages long on June 23, 1975. The teacher was cross-examining the Superintendent of Schools Mr. Johnson. The BOARD'S negotiator, Mr. McGinn, and the BOARD'S psychiatrist, Dr. Osinski, had been waiting to be called as witnesses. The teacher requested an adjournment (Transcript in Record 77, 74-86). He explained to the hearing officer that his past search for an attorney was for one who would let the teacher take care of substantive matters and now

(ARGUMENT, POINT I CONT'D)

that he is faced with an "actual trial" of the Charges he would have to allow the attorney to prevail on his own terms (Transcript at p. 404 in Record 78-79). The adjournment was granted to July 11, 1975.

When negotiations were carried on between the teacher's attorney, Mr. Breslin and the BOARD'S Superintendent, Mr. Johnson, and attorney, Mr. Lettko, within the two week period before the adjourned date of July 11, 1975, the full thrust of the above threefold setting was met.

(Compare moving affidavits of Mr. Johnson and Mr. Lettko, Record 46, 49, 38-53, with Agreement, recitals in preamble, Record 54-55, 54-60; no controverting affidavit from the teacher's later-discharged attorney, Mr. Breslin) (Record 91-110; Addendum pp.54-60 this brief)

The detailed Specifications of Charges in great part pinpointed the documentary evidence that was available to both the teacher and the BOARD in support of the Charges. Approximately 14 Exhibits had already been received in evidence (Transcript, p. 433, in Record 107). The teacher was fully accorded his due process rights and fully participated in his adversary hearing under 3020-a both personally without counsel on June 11, 19 and 23, 1975 and later with counsel on July 11, 1975. Affirming on the Record after his attorney read in the Agreement, that he (Record 105, 94-110) agreed to it/and in the presence of the hearing officer, the teacher signed the Agreement with his attorney as acknowledged by the hearing officer, Mr. Walsh (Record 60, 68) who formally declared the 3020-a proceeding terminated in accordance with the

(ARGUMENT, POINT I CONT'D)

stipulations. (Record Cf. 106, 68)

The teacher under the Agreement, declaring no contest, and that no other action was pending than as therein stated, achieved the following: (Addendum pp.58-64 this brief; Record 54-60, Cf. 94-110)

1)- Immediate discontinuance on the merits of the 3020-a proceeding and Charges and Specifications.

2)- Rather than stripping plaintiff of tenure, guaranteed his uninterrupted tenure.

3)- Guaranteed his reinstatement to performance of duty upon certification that the teacher has the mental capacity to perform his duties as such tenured teacher.

4)- Dismissal of the Charges of mental incompetence as well as all of the Charges on the merits.

5)- Immediate removal of the 3020-a suspension by transforming and replacing it with immediate sick leave.

6)- Accommodating the possible event that his certification might be conditioned upon future treatment and if so allowing reinstatement to duty and performance while treatment should be continued.

7)- Collection of accrued sick leave benefits starting with the school year opening after

(ARGUMENT, POINT I CONT'D)

September 1, 1975 until certified for rein-
(1)
statement or accrued sick leave ran out. (See
Agreement, Record 54-60 and see also on p. 60 in
Addendum this brief)

Pursuant to the Agreement, the teacher actually went to his own psychiatrist, Dr. Camperlengo (Statement of Facts herein, Record-47 p. 5). However by September 12, 1975 the teacher had a change of heart and discharged his attorney, Mr. Breslin, on September 12, 1975 who had acted pursuant to the Agreement (correspondence and proposed short form stipulation-Record 69-73) (Record-50, 52)

At no time did the teacher present or offer to present an affidavit from his discharged attorney to controvert negotiation of the Agreement or the affidavits of Mr. Johnson or Mr. Lettko or to substantiate the teacher's own sworn allegations attacking it.

The teacher has received substantial considerations not only in his posture as of September 15, 1975 when he confirmed in open Court (Record 50, Cf Appendix 9+) his termination of attorney Breslin and his request for adjournment to obtain another attorney, but also in his posture as he appears before this U. S. Court of Appeals as one who has collected \$15,250.66 in sick leave pay, refuses to submit for further evaluation by the BOARD'S psychiatrist Dr. Osinski (or even to a Court appointed doctor as informally offered), and continues to be a

(Footnote:

(1) \$15,250.66 collected from September 1, 1975)
(through June 15, 1976 and exhausted.)

(ARGUMENT, POINT I CONT'D)

tenured teacher despite his selective part-performance (examined by Dr. Camperlengo and acceptance of sick leave benefits) and defiantly essential nonperformance of the Agreement. (Record 171, BOARD'S memorandum, pp. 13-15, Cf Record 180-181).

As the District Court's Decision below notes on Page 3 (Appendix 9+, Record 268-275):

"At the onset of this discussion it must be noted that any attack upon a compromise and settlement agreement affecting a pending action must be limited in scope by established principles of contract law. See Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F. 2d 767, 771 (2d Cir. 1975), pet. for cert. filed sub nom. Larkin v. Patterson, 44 U.S. Law Week 3069 (July 28, 1975); Cf. Meetings & Expositions, Inc. v. Tandy Corporation, 490 F. 2d 714, 717 (2d Cir. 1974) (per curiam). Additionally, the fact that the action filed in this District Court was one involving constitutional rights alters neither the ability of the parties to settle the action nor the ability of the plaintiff to waive further litigation on alleged violation of his constitutional rights. Cf United States v. Armedo-Sarmiento, 524 F. 2d 591 (2d Cir. 1975) (per curiam).

* * *"

(emphasis added)

Both the teacher MR. McFERRAN in his brief in this Court and his attorney Joan Goldberg in her memorandum (Record 170) in the District Court rely heavily on Matter of Boyd v. Collins

(ARGUMENT, POINT I CONT'D)

11 N.Y. 2d 228 (1962) where the Court found, on Page 233:

" * * * It is clear on this record that petitioner never voluntarily quit her job but was told by the board president to stop teaching and not to return to her classroom. It is unquestionably a violation of the statute and of tenure rights to remove, without charges and hearing, a teacher who has tenure. Of course, a teacher like any other employee may resign but the assertion here is not that the petitioner resigned but that for a consideration she waived her right to a hearing.

* * *

A dismissal without hearing, charges and findings is illegal * * * " (Boyd, supra 11 N.Y. 2d 228, 233; emphasis added)

The Boyd case, supra, (11 N.Y. 2d 228, 233) obviously does not apply at bar since it is undisputed at bar that the teacher MR. McFERRAN was not dismissed, is still a tenured teacher, did have a hearing on Charges and detailed Specifications in which there were no findings because that 3020-a proceeding was compromised and settled by stipulation read into the record by his counsel who signed the same with the teacher.

The teacher's over-reliance on Boyd, supra (11 N.Y. 2d 228) renders his contentions herein without merit.

For example, the teacher MR. McFERRAN'S own previous Court of Appeals case in a different school district, to wit, Matter of Albert E. McFerran v. Board of Education, Colonie Central Schools, Central School District No. 1, 15 N.Y. 2d 630 (1964) affirming 21 A.D. 2d 944(9) -- two years after the Boyd case

(ARGUMENT, POINT I CONT'D)

above (1962) -- affirms the Appellate Division, Third Department in interpreting and upholding an agreement of discontinuance entered into through counsel (See p. 631) by MR. McFERRAN who, in that earlier case in another school district had requested that his tender of resignation be withdrawn and demanded a hearing on the charges previously preferred against him. The summary of McFerran v. Board-Colonie, supra on Page 631 of 15 N.Y. 2d 630 reads:

" * * * The Appellate Division stated that the use of the term 'without prejudice' in discontinuing the proceeding, already mooted by the parties' respective acts of tender and acceptance and the withdrawal of the charges, was not intended to reserve to either party the right to compel at will the reinstatement of the accusations and a trial thereof, and that said phrase was meant to effect a vacatur of the charges without imputation of wrongful behavior on the part of petitioner."
(Matter of McFerran v. Board ...Colonie, supra
15 N.Y. 2d 630, 631)

The Appellate Division's order was affirmed with no opinion by the Court of Appeals (15 N.Y. 2d 630, 632). The Appellate Division's decision therein, McFerran v. Board of Education, Colonie Central Schools etc., 21 A.D. 2d 944(9) (1964) sets forth the background detail such as the preferment of charges, notice of hearing, retaining of an attorney, stipulation to adjournment of hearing, resignation effective on a future date by the teacher, conveyance of same to the board's attorney by

(ARGUMENT, POINT I CONT'D)

teacher's attorney on the

" * * * understanding that the charges here-
tofore filed against Mr. McFerran which were
scheduled for hearing on January 29, and ad-
journed to February 13, are discontinued
without prejudice to either party",

followed by the board's resolution further providing

" * * * that the aforesaid hearing upon
charges against the said Albert E. McFerran, Jr.
be and the same is discontinued without prejudice."
(McFerran v. Board-Colonie, supra, 21 A.D. 2d
944, 945 aff'd 15 N.Y. 2d 630)

In Matter of Leonard Cedar v. Commissioner of Education of
the State of New York, 30 A.D. 2d 882(2) 1968, Mot. for lv to
appeal den., 22 N.Y. 2d 646, four years later, affirming 53 Misc.
2d 702, the Appellate Division, Third Department, in a per curiam
decision, and relying on the same Court of Appeals decision in
Matter of McFerran v. Board of Education-Colonie, supra, 21 A.D.
2d 944(9), aff'd 15 N.Y. 2d 630, proceeds to place in per-
spective the earlier case of Matter of Boyd, supra (11 N.Y. 2d
228)

The Cedar case, supra (30 A.D. 2d 882(2) Mot. for lv to
appeal den., 22 N.Y. 2d 646) is also important because, as in
the case at bar, it involved a certain agreement made during
the period of trial of charges against the petitioner, Leonard
Cedar, a school teacher, on tenure, as allegedly violative of
the Constitution and of Education Law §3013 -- of which Subd. 3
was later repealed by Chapter 717, Laws of 1970 and replaced by
§3020-a applicable at bar. There the petitioner urged the

(ARGUMENT, POINT I CONT'D)

invalidity of the agreement on two grounds, first as a waiver of tenure rights in contravention of §3013 and second as violative of the Constitutional prohibition of gifts of public funds. The following excerpts from the Appellate Division's decision in Cedar, supra 30 A.D. 2d 882(2) Mot. for lv to appeal den., 22 N.Y. 2d 646 are quoted:

" * * * From the first ground urged it would follow that a teacher under charges could never resign but would have to go through with hearings to the end, however distasteful, imprudent or, indeed, catastrophic that course might be. We find nothing supportive of this contention in Boyd (supra, p. 233), where it was said: 'It is clear on this record that petitioner never voluntarily quit her job but was told by the board president to stop teaching and not to return to her classroom. It is unquestionably a violation of the statute and of tenure rights to remove, without charges and hearing, a teacher who has tenure. Of course, a teacher like any other employee may resign but the assertion here is not that petitioner resigned but that for a consideration she waived her right to a hearing'.

(emphasis supplied; and see Matter of McFerran v. Board of Educ. 21 A.D. 2d 944, affd. 15 N.Y. 2d 630) * * *. (quoted from Cedar, supra, 30 A.D. 2d 882(2), Mot. for lv to appeal den., 22 N.Y. 2d 646)

At bar, though the teacher MR. McFERRAN did not resign, he did with the aid of counsel compromise and settle.

(ARGUMENT, POINT I CONT'D)

The Court in Cedar, *supra*, (30 A.D. 2d 882(2), Mot. for lv to appeal den. 22 N.Y. 2d 645), further wrote at page 882:

"Special Term also correctly rejected the second ground of petitioner's argument -- that which denominated the \$4,500 payment an unconstitutional gift of public funds, voiding the agreement. Again, we find petitioner's reliance upon Boyd (*supra*) a mistaken one. It is true that there was voided in that case, for constitutional invalidity, 'an agreement under which public money would be paid without services rendered on condition that charges be withheld and the teacher resign' (p. 234); but the context of that general description, quoted from the memorandum decision in the Appellate Division, was the morally and legally indefensible subterfuge employed by the school board whereby Mrs. Boyd was to be paid her salary, as salary, until the end of the year, although, at the board's direction, she had long since stopped teaching and was not to teach again. Here there was no such pretense or chicanery nor any purported or ostensible payment of salary 'without services rendered'."

(Cedar, *supra*, 30 A.D. 2d 882(2) Mot. for lv to appeal den., 22 N.Y. 2d 646)

Then the Appellate Division concentrates on the agreement and stipulation (Cedar, *supra*, 30 A.D. 2d 882(2) at p. 883):

"The stipulation, entered upon the minutes of the pending quasi-judicial proceeding, was exactly what it purported to be -- the compromise of a legal dispute, entered into at arm's length by adult parties represented by counsel. Each chose thus to be assured against the possibility of a less favorable conclusion of the litigation. In similar vein, Special Term held: 'In my opinion, respondent also properly concluded that the

(ARGUMENT, POINT I CONT'D)

Board had the right to negotiate a settlement of a potential claim in avoidance of expensive and uncertain litigation in the best interests of the taxpayers of the school district. The payment of a sum of money by the Board in settlement of a contested claim in consideration of a resignation and general release to the Board under the facts and circumstances here was a payment for a legitimate school purpose (Education Law, §1709) and could not be construed as a gift of public moneys without services rendered. (53 Misc 2d 702, 704-705, *supra*) Judgment affirmed, without costs.

Gibson, P.J., Herlihy, Aulisi, Staley, Jr. and Gabrielli, J.J., concur in memorandum *Per Curiam*." (Cedar v. Commissioner, *supra*, 30 A.D. 2d 882(2), 883, 1968, Mot. for lv to appeal den., 22 N.Y. 2d 646) (emphasis added)

It therefore follows at bar where there was a compromise and settlement Agreement with formal stipulations and with positive benefits, alien to even resignation, flowing to the teacher herein, that there was full validity to which the Record attests. Compare Matter of Loiacono, Commissioner's Decision 8456, 1972, 11 Ed Dept Rep. 270, 272; and Matter of Berke, Commissioner's Decision 8545, 1972, 12 Ed Dept Rep 93, 94.

Accordingly, the Agreement is not contrary to the public policy of New York State as contended in the teacher's brief (Point II thereof, pp. 17-22). For in the far-reaching, four-corner embrace of the law -- be it constitutional law, statutory

(ARGUMENT, POINT I CONT'D)

or case law -- the same public policy that nullifies in Matter of Boyd v. Collins, supra, 11 N.Y. 2d 228 (1962) up-holds in McFerran v. Board-Colonie, supra, 15 N.Y. 2d 630 (1964) and further upholds in Matter of Cedar v. Commissioner, supra, 30 A.D. 2d 882(2) (1968), Mot. for lv. to appeal den., 22 N.Y. 2d 646. Public policy includes the Constitution, both Federal and State. Public policy is not fragmented, does not thrive in a vacuum, but rather inheres with the vitality of its multiple facets in the reality of reasonable discernments and distinctions as the facts require.

The Agreement, coming as it does in the three-fold setting set forth on Page 14 of this brief and negotiated, read into the record and signed by both teacher and his attorney, climaxes a full accord and exercise of constitutional rights in the highest tradition and accommodates the principles enunciated in the very cases cited by the teacher such as Matter of Downey v. Lackawanna School District, 51 A.D. 2d 177 at 179 -- which, unlike Cedar, supra, 30 A.D. 2d 882(2) (1968), does not involve the compromise and settlement of potential claims -- and Bear v. Nyquist, 336, N.Y.S. 2d 476 -- where the proscribing of waiver by a teacher of his tenure rights is alien to the full exercise and guarantee of tenure rights at bar -- and in Mount St. Mary's Hospital v. Catherwood, 26 N.Y. 2d 493 -- invoked also by the Board/ that "parties in voluntary agreement are not limited, except in rare matters contrary to public policy, from agreeing to anything

at p. 507

(ARGUMENT, POINT I CONT'D)

they wish" -- and in Matter of Teachers of Huntington, 30 N.Y. 2d 122 at Page 131 -- in which there is no scintilla of a public policy prohibition against settling section 3020-a proceedings or charges. (It should be noted, as referred to on Pages 420-422 of the transcript (Record 94-96) that at MR. McFERRAN'S request and that of his counsel, those members of the general public were required to vacate during the reading of the Agreement into the Record)

The teacher's admitted "paraphrase" on Page 24 of his brief, of Matter of Jerry v. Board of Education, Syracuse, 35 N.Y. 2d 534 at Page 543 is grossly unwarranted in view of the same high Court's position expressed in McFerran v. Board-Colonie, supra 21 A.D. 2d 944, aff'd 15 N.Y. 2d 630(1964) and in Matter of Cedar v. Commissioner, supra 30 A.D. 2d 882(2) 1968, Mot. for lv to appeal den., 22 N.Y. 2d 646. The New York Court of Appeals in Jerry, supra, 35 N.Y. 2d 534 at Page 543, was merely stating that if suspension on charges were to be allowed without pay, before the hearing, there should be a specifically defined authority from the legislature.

(Footnote:

(1) Including Troy Teacher Association representatives)

(ARGUMENT CONT'D)

POINT II

NOTHING IN THE BACKGROUND OF THE TEACHER'S 3020-a CHARGES, HEARING AND COMPROMISE AND SETTLEMENT AGREEMENT INVALIDATES THE CHARGES, HEARING OR SETTLEMENT AGREEMENT WITH ITS FORMAL STIPULATIONS.

PRE-3020-a ANALYSIS AND ARGUMENT

Having been the target of the tenured teacher MR. McFERRAN'S verbal onslaught and intimidation of January 8, 1975, face to face, the Chief Executive Officer, Superintendent of Schools Sidney L. Johnson, after calling in the Troy Teacher's Association representative, imposed a protective-type, temporary suspension upon said teacher under section 2508(5) of the Education Law. He did not feel he could entrust children to his care. (Record 229-230; Cf Bd's XVI attached to Record 171; 238-242) He made a report to the BOARD OF EDUCATION at a special meeting on January 14, 1975 to comply with said statute. The urgency warranted a special meeting. (Record same references)

The BOARD had already known of MR. McFERRAN'S strange conduct in the past (see Specifications of Charges on conduct unbecoming a teacher, BOARD'S Ex. XII in Record 139-145, Cf 13-17; 231-236).

A committee of the BOARD had listened to the teacher for three hours at a hearing on December 4, 1974. (Record 231-236). It appeared that the climax had been reached on January 8, 1975

(ARGUMENT, POINT II CONT'D)

when the teacher displayed a direct, personal, intimidating approach and disturbing verbal onslaught against the Superintendent Mr. Johnson (Record 229-230; 238-242; Bd's XVI attached to Record 171).

Whether to reinstate the teacher and let him try to take over the school district or whether to require him to be examined by a psychiatrist to be appointed by the BOARD under section 913 of the Education Law were the options facing the BOARD.

On January 14, 1975 the BOARD made its decision expressed in its resolution (Exhibit XVI attached to Record 171; Record 238-242).

The resolution itself recites the reasons and required a copy to be given to the teacher MR. McFERRAN. The Superintendent's transmittal letter and subsequent letter gave MR. McFERRAN the opportunity to discuss the reasons. The teacher did not exercise his right to discuss it. Instead the teacher did go to Dr. Osinski on two separate occasions (Dr. Osinski's report, BOARD'S Exhibit XIII, Record 146-154). After two visits, the teacher, adhering to his past pattern of making accusations, brought charges against the BOARD'S doctor, Dr. Osinski. (Record 149-154; Cf. Record 244-249, 250-256, 257-258; Compare Specs Chg III in Record 142-145; Bd's XV in Record 156-166; Record 266-267; Agreement, paras. 8, 9 & 7, Addendum this Brief, also in Record 58-57)

When the psychiatrist Dr. Osinski's report dated March 21, 1975 was received, it was transmitted by the Superintendent Mr. Johnson to the teacher MR. McFERRAN who was asked to meet with

(ARGUMENT, POINT II CONT'D)

the BOARD members to discuss it. (Record 125, item 11; Complaint attachments in Record 27-29) When MR. McFERRAN did not show up at such meeting on April 1, 1975, he was called on the telephone by the Assistant Superintendent, Mr. Murray, who received response that if he did not get off the phone MR. McFERRAN would call his name into the police. (Specs. of Charges, p.4, item 11, in Record 142; 139-145; and same references as above)

The teacher was subsequently given another date, April 22, 1975, in a previous letter from the Superintendent dated April 14, 1975 explicitly stating that the purpose was to explore his willingness to seek psychiatric assistance through a physician of his own choice. (Specs. of Charges, p.3 in Record 141-142; Cf Record 27-29) MR. McFERRAN did not show up at such second meeting on April 22, 1975. (Record 27-29) There was a by-law, described in Matter of McFerran, Commissioner's Decision No. 9033, 14 Ed Dept Rep 391, 392, implementing a situation where a teacher may continue teaching while receiving psychiatric treatment under certain conditions. A sick-leave hearing was initially set up by the BOARD but cancelled in favor of 3020-a Charges and hearing. (Record 30)

As of this time, the status was that the teacher, MR. McFERRAN, while receiving his full pay since January 8, 1975 on this temporary suspension, refused to continue evaluation by the BOARD'S psychiatrist, Dr. Osinski, instead brought charges against the psychiatrist, and refused to meet with members of the

(ARGUMENT, POINT II CONT'D)

BOARD to discuss Dr. Osinski's report and his willingness to receive professional assistance referred to by the doctor in his report.

And in the meantime, the teacher had filed his appeal No. 10416 dated January 31, 1975 with the COMMISSIONER OF EDUCATION under section 310 of the Education Law in the first part of February 1975 thus availing himself of a right of review. This was argued on April 8, 1975 before Acting Commissioner Ambach (Record 162), and was also stipulated discontinued on the merits by par. 5 of the Agreement (Addendum this brief; Record 57, 54-60).

So that when the BOARD went into Executive Session under §3020-a(2) on May 5, 1975 the Charges and Specifications in their detailed three-way approach reflected this orientation of the case: the conduct of this tenured teacher was due either to a mental illness or disability according to Dr. Osinski's report or, if the proof at the hearing were to show that the teacher MR. MCFERRAN'S conduct was not due to this cause, then the probability was that his conduct therein specified constituted conduct unbecoming a teacher and/or insubordination. (Complaint Exhibit A, BOARD'S Resolution of 5/5/75 in Record 13-17; and Specifications of Charges, annexed thereto, in Record 139-145; Cf Matter of McFerran, Decision No. 9033 dated 6/9/75, 14 Ed Dept Rep 391-393, and Matter of McFerran, Decision No. 9032, dated 6/9/75, 14 Ed Dept Rep 390-391.)

The BOARD'S Resolution of May 5, 1975 recites its deliberation and determination of probable cause pursuant to section

(ARGUMENT, POINT II CONT'D)

3020-a(2) after having considered the available evidence. (Record 13-17, Ex. "A" attached to Complaint; and for Specification of Charges annexed thereto see Record 139-145, BOARD'S Ex. XII; and Record 18-22)

Although there had been a temporary suspension from January 8, 1975, as continued by the BOARD in its resolution of January 14, 1975, the suspension imposed by the resolution of May 5, 1975 was now specifically a suspension on Charges under section 3020-a(2). (Record 13-22; 139-145).

The first suspension was protective in nature, included full pay, and accommodated the necessary examination by the BOARD'S psychiatrist Dr. Osinski under section 913 of the Education Law. (BOARD'S Ex. XVI, including two letters to MR. McFERRAN from the Superintendent and copy of BOARD'S Resolution of January 14, 1975, attached to BOARD'S memorandum, Record 171; Record 238-242)

The second suspension, also with pay, imposed by the Resolution of May 5, 1975, was definitely procedural to the 3020-a Charges and Specifications against said teacher. (Record 13-17, 18-22, 139-145) (Suspension imposed on p.4 of Bd's Res-Record 16)

(One of the options that hypothetically existed in the event mental disability was found and determined upon the evidence at the 3020-a hearing, was to recommend disability retirement -- Cf §913 Education Law)

The teacher MR. McFERRAN argues, in effect, that although he received his pay, the first or temporary suspension -- also termed as a suspension for "an indefinite period" or indefinite suspen-

(ARGUMENT, POINT II CONT'D)

sion (Appendix p. 1) -- somehow legally precluded the second suspension imposed by the 3020-a Resolution of May 5, 1975. He further argues that the first suspension also legally prevented or invalidated the holding of the 3020-a proceeding which, together with his said corresponding second suspension of May 5, 1975, his subsequent Federal Court action 75-CV-265 of May 28, 1975 attacked and sought to restrain. (Appellant's Brief pp 6-13; 17-24)

It is indisputable from the Record that both personally and with the aid of counsel this teacher MR. McFERRAN solemnly, formally and willingly entered into a compromise and settlement Agreement on the 4th hearing day, July 11, 1975. And by discontinuance on the merits of the 3020-a proceeding and charges, he necessarily vacated and eliminated the target-subject-matter of his District Court Complaint.

Yet, relying on and accepting the 3020-a hearing and charges as discontinued on the merits or "dropped" (as he claims) the teacher eschews performing those of his promises unfulfilled as of his change of heart in September 1975. Instead the teacher sought and still seeks to use his Federal Court action 75-CV-265 to achieve all of the various items of relief sought in this action and appeal which he either previously sought and had determined against him and did not pursue in appeal or which he had the opportunity to pursue in the proper forum and failed timely to do so.

(ARGUMENT, POINT II CONT'D)

(Compare his citation of Matter of School District-Cheektowaqa v. Nyquist, 38 N.Y. 2d 137, November 1975, with his unappealed Commissioner's Decision No. 8608, Matter of McFerran 1973, 12 Ed Dept Rep 197-199, and with pp.2-4 of the teacher Mr. McFERRAN'S brief, also with his appeal dated May 1972 in Record 195-196)

For example, with respect to the subject matter of MR. McFERRAN'S alleged off-step claim -- set forth on pp. 2-4 of his brief herein, the teacher by his characterizations, in effect admits this attitude, in light of his entire brief and the Record. On p. 2 of his brief, MR. McFERRAN writes:

"* * * Essentially what was in conflict was the salary credit due to a teacher as a result of the continuity of credited service, and this continuity was guaranteed as a matter of law which the school district had actually and illegally interrupted the very year, 1966, in which I had been granted my tenure, an action which required three continuous years of service in the mentioned school district. All attempts to resolve the matter with the use of attorneys and the teachers organization were futile. The matter was taken to the Commissioner of Education who decided in favor of the school district ...

* * * My Decision, #CD 8608, February 26, 1973, was issued after each of the cited decisions. * * *"
(Emphasis added in part) (From the teacher MR. McFERRAN'S brief, p.2

Based upon this alleged initial error, the teacher -- apparently giving up on attorneys and teacher organizations -- weaves in his brief a fantastic fabric of multiple harms

(ARGUMENT, POINT II CONT'D)

allegedly inflicted upon him through some alleged deliberate hoax or alleged cover-up. The Record shows both in his sworn affidavits and in the Specifications of Charges how the teacher MR. McFERRAN systematically and relentlessly made charges or accusations against many persons who did not accede to his views or claims. (Record 149-154; Cf. Record 244-249, 250-256, 257-258; Compare Specs Chg III in Record 142-145; Bd's XV in Record 156-166; Record 266-267; Agreement, paras. 8, 9 & 7, Addendum this Brief, also in Record 58-57)

The teacher created somewhat of an anomaly in the following respects:

He brought his Federal Court action 75-CV-265 after service of charges under 3020-a and before the first hearing day (Complaint served on the Commissioner on May 28, 1975). His purpose was to restrain and to declare unconstitutional a substantial portion of section 3020-a.

He could have instead (as suggested in Matter of McFerran, Commissioner's Decision No. 9033 14 Ed Dept Rep 391, 392,) appealed after the hearing was over and a determination made, directly to the Commissioner or could have appealed by way of Article 78 proceeding directly to the State Supreme Court. (§3020-a(5))

(ARGUMENT, POINT II CONT'D)

But having elected his own approach, by means of the Federal Court action, 75-CV-265, he at no time, either without counsel in June 1975, and with counsel in July 1975, brought on any motion for a preliminary injunction or restraining order. The failure to do so, combined with the direct stipulation in the Agreement to discontinue the Federal Court action, give added weight to the dispositive intent pervading the acts of himself and his attorney in making such Agreement.

The teacher cites Matter of Randall v. Toll, 73 Misc. 2d 451 where the Special Term of the New York Supreme Court of Suffolk County was presented with the issue whether subdivision 3 of section 75 of the Civil Service Law, providing for a suspension without pay for a period up to 30 days pending determination of charges of misconduct or incompetency, is constitutional. In Randall, Special Term read Fuentes v. Shevin, 407 U.S. 67, as requiring a hearing prior to even a temporary suspension. The following important observations are necessary in connection with the Randall case, supra (73 Misc 2d 451):

First, even in the Randall case, Special Term, in vacating petitioner's temporary suspension, did not vacate the administrative hearing but rather the Court expressly anticipated that the plaintiff's demands for a Bill of Particulars and independent hearing officer would be granted at least ten days

(ARGUMENT, POINT II CONT'D)

prior to the administrative hearing.

Secondly, in the case at bar, neither the teacher's first protective suspension nor his later 3020-a suspension were without pay.

And thirdly, the subsequent case of Mtr. of Jerry v. Board of Education, Syracuse, 35 N.Y. 2d 534 (12/20/74) necessarily overruled Randall, supra (73 Misc. 2d 451) in the following two pronouncements at Page 541:

"* * * All of the members of the court are of the view that suspension of a tenured teacher without pay pending the final determination of section 3020-a disciplinary proceedings, provided such determination is not unreasonably delayed, would involve no infringement of the teacher's constitutional rights (Sanford v. Rockefeller, 35 N.Y. 2d 547; Arnett v. Kennedy, 416 U.S. 134; Cf. Michell v. Grant Co., 416 U.S. 600; Pordum v. Board of Regents of State of N.Y., 491 F. 2d 1281, cert. den. ____ U.S. ____ , 43 U.S.L.W. 3197). * * *

The power of suspension is essential to the sound administration of the public school system -- for the protection of the pupils in certain circumstances, for the protection of the teacher in other circumstances, and in many situations for the promotion of the best interests of the public.
* * *" (Mtr. of Jerry, supra, 35 N.Y. 2d 534, 541)

Unlike Matter of Harris v. School District, 86 Misc. 2d 144, cited by MR. McFERRAN on Page 24 of his brief, there was

(ARGUMENT, POINT II CONT'D)

no determination at bar. Even in Harris, supra (86 Misc. 2d 144) the Court did not disturb the Board's determination of the teacher's guilt for insubordination. Instead the Court returned it to the Board for a penalty short of dismissal. Compare at bar where there is no dismissal of the teacher or even a determination but rather a voluntary settlement Agreement with aid of counsel.

In Matter of Jerry v. Board of Education, Syracuse, supra, 35 N.Y. 2d 534(1974) at Page 543, the Court of Appeals rejected the contention of the teacher that constitutional protection of right of privacy precluded the use of the first charge as a predicate for disciplinary proceedings. The Court stated it could not accept the proposition that the Constitution confers an absolute right of privacy and concluded that such right must give way to circumstances of that case to a recognition of the legitimate interests of the school -- especially, page 543:

"* * * if the conduct directly affects the performance of the professional responsibilities of the teacher, or if, without contribution on the part of school officials, the conduct has become the subject of such public notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of his position."
(Matter of Jerry, supra, 35 N.Y. 2d 534, at Page 543)

(ARGUMENT, POINT II CONT'D)

Even in Matter of Jerry, supra, (35 N.Y. 2d 534), New York's high Court did not preclude the 3020-a hearing from taking place even after invalidating a suspension without pay. As a matter of fact the hearing did take place thereafter as reported in Matter of Jerry v. Board of Education, 50 A.D. 2d 149, 161 (December 1975), and the teacher was dismissed.

In regard to the psychiatric examination under section 913 of the Education Law, both the Board's resolution of January 14, 1975 and the transmittal and follow-up letters conveying same to the teacher MR. McFERRAN gave the teacher notice of the reasons and of the reliability of the reasons, and operate to give the teacher the opportunity to discuss the reasons even before his first appointment with Dr. Osinski. (Leonard v. Sugarman, 466 F. 2d 1366 (2d Cir. 1972). The teacher had the same fundamental notice as to his first suspension and the reasons besides on-the-spot notice by the Superintendent Mr. Johnson on January 8, 1975 as part of the res gestae. (Cf "extraordinary situations where some valid governmental interest is a stake" in Boddie v. Connecticut 401 U.S. 371, 379, 91 S. Ct. 780, 786) At bar, the Agreement recites that the teacher declares he does not contest the charges. (Par. 9, Agreement, Addendum this brief, Record 58, 54-60)

At bar the teacher MR. McFERRAN not only had repeated real opportunities to discuss the section 913 examination by the BOARD'S psychiatrist both before and after, but also had, as part of the 3020-a proceedings a formal specific adversary

(ARGUMENT, POINT II CONT'D)

hearing directly confronting the claim of mental disability with detailed charges and with a comprehensive report by the BOARD'S psychiatrist.

(This 3020-a adversary hearing also self-evidently covered other charges of conduct going back to 1973 (Specification of Charge III, BOARD'S Exhibit XII, Record 142-145)

The BOARD'S doctor, Dr. Osinski, was waiting to testify, having actually attended on two hearing days without being reached. So was the BOARD'S negotiator Mr. Arthur McGinn. The teacher, possessing a copy of Dr. Osinski's report, from the latter part of March 1975 (Record 76-86, Cf 257, 27-28) had ample opportunity to procure his own medical witness to testify in opposition. And in any event, the teacher had the right to cross-examine such doctor as he did the Superintendent. (Record 76-86)

However when the teacher obtained counsel about two weeks before the adjourned hearing date of July 11, 1975 and the Agreement was negotiated, read into the Record and signed by the parties and their attorneys after agreeing on the Record, what greater exercise of constitutional prerogatives could exist!

Had not the teacher MR. McFERRAN been accorded his full constitutional rights including the right of waiving whatever other constitutional rights and claims, if any, that had accrued in his favor, if any, as of the stipulated Agreement of July 11, 1975 and its respective formal discontinuances!

(ARGUMENT, POINT II CONT'D)

Though not applicable to section 3020-a or 913 of the Education Law in the case at bar, the respective cases of Marie Snead v. Department of Social Services of the City of New York et al, U.S. District Court, Southern District, New York, reported in 371 F. Supp, 1360(1972), and in 389 F. Supp 935 (1974), and in 409 F. Supp 994 (1975), and in 409 F. Supp 995 (1975) point to due process safeguards which were afforded to the teacher MR. McFERRAN at bar, with pay. Cf Leonard v. Sugarman 466, F. 2d 1366 (2d Cir.).

Regarding Matter of Peterkin, Commissioner's Decision No. 8121, 1970, 9 Ed Dept Rep 160-161, cited by MR. McFERRAN, not only has Education Law 3013(3) been repealed and replaced by section 3020-a, by Chapter 717 of the Laws of 1970, but that Decision, entitling the petitioner to reimbursement for one day's pay before charges were served, in no way holds that the subsequent charges under 3013(3) were invalid.

The teacher has presented no authority for his contention that the prior suspension of January 8, 1975 as continued in the resolution of the BOARD on January 14, 1975 invalidates the subsequent 3020-a suspension imposed by the BOARD'S resolution of May 5, 1975, or invalidates such 3020-a proceeding itself.

Contrary to the teacher's Point III Pages 22-24 of his brief, in view of the full exercise of constitutional rights by the teacher MR. McFERRAN with the aid of counsel, there was no violation of due process even though his Agreement may be regarded as having waived other constitutional rights or claims if any

(ARGUMENT, POINT II CONT'D)

which may have accrued. (Cf McFerran v. Board-Colonie, supra 21 A.D. 2d 944(9) aff'd 15 N.Y. 2d 630; and Cedar v. Commissioner, supra, 30 A.D. 2d 882(2) Mot. for lv to appeal den., 22 N.Y. 2d 646)

There is nothing in Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 nor in Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694 which takes into view a tenured teacher who, as at bar, has been accorded and has exercised his constitutional rights.

Some of the cases cited in attorney Joan Goldberg's memorandum of law (Record 170) have been treated in the BOARD'S responding memorandum (Record 171). See also BOARD'S prior memorandum (Record 129-138 and especially 133-138).

The United States Supreme Court in Ackermann v. United States 340 U.S. 193, 198, 71 S. Ct. 209, at Pages 211-212 holds unequivocally:

"* * * Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation someday and free, calculated choices are not to be relieved from."

(ARGUMENT, POINT II CONT'D)

The above Ackermann case appears as a footnote in Curtis Publishing Co. v. Butts, 388 U.S. 130, 143, 87 S. Ct. 1975, on Page 1985, which in turn is cited by Hensley v. United States, Tenth Circuit, 406 F. 2d 481, at Page 484:

"* * * It is clear that even 'constitutional objections may be waived by a failure to raise them at a proper time'".

Gardner v. Broderick, 392 U.S. 273

The constitutionality of section 3020-a of the Education Law was upheld in the case of Smerald v. Bellanger et al 36 N.Y. 2d 875 (June 4, 1975), affirming 42 A.D. 2d 909.

The case of Hodgkins v. Central School District No. 1 et al 48 A.D. 2d 302 (June 12, 1975) ruled that the Commissioner of Education had power to promulgate new regulations for conducting disciplinary proceedings under 3020-a. Said regulations were adopted on February 28, 1974 to comply with directions in Kinsella v. Board of Education 378 F. Supp. 54, 60. Cf Matter of Jerry v. Board of Education, 50 A.D. 2d 149 at Page 161 (December 1975); and Matter of Bott v. Board of Education, 51 A.D. 2d 81, at Page 83 (1976).

In Arnett v. Kennedy, supra, 1974, 416 U.S. 134, at Pages 152 and 153 (94 S. Ct. 1633), the Supreme Court stated:

"The Court has previously viewed skeptically the action of a litigant in challenging the constitutionality of portions of a statute under which it has simultaneously claimed benefits."

(ARGUMENT, POINT II CONT'D)

The Supreme Court in Arnett, supra, goes on to quote from its prior decision in Fahey v. Mallonee, 332 U.S. 245, 67 S. Ct 1552, 1557:

"* * *

'It is an elementary rule of constitutional law that one may not retain the benefits of an act while attacking the constitutionality of one of its important conditions'. (Citing United States v. San Francisco, 310 U.S. 16, 29, 60 S. Ct. 749, 755)

"As formulated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 56 S. Ct. 466, 483 ... 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits'".

The Arnett Court observes on Page 153 of 416 U.S. 134, as follows:

"This doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach. We believe that at the very least it gives added weight to our conclusion that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." (Arnett, supra, 416 U.S. 134, 153; 96 S. Ct. 1633)

It is respectfully submitted that the same reasoning is valid as regards the teacher MR. McFERRAN'S 3020-a proceeding and its Settlement Agreement and his selective acceptance of

(ARGUMENT, POINT II CONT'D)

its immediate and monetary benefits and repudiating his promises after a change of heart in September 1975.

POINT III

UPON EXAMINING THE SETTLEMENT AGREEMENT WITH ITS STIPULATED DISCONTINUANCES, AND FINDING IT TO BE FAIR AND REASONABLE IN THE LIGHT OF SURROUNDING CIRCUMSTANCES, THE DISTRICT JUDGE PROPERLY APPROVED AND APPLIED IT AND HIS DISCRETION SHOULD NOT BE DISTURBED.

The District Court's decision reflects a thorough grasp and exhaustive and comprehensive review of the papers constituting the Record and the teacher MR. McFERRAN'S oral statements on September 15, 1975, November 3, 1975 and full oral argument on December 1, 1975.

Completely missing from the teacher's rationale as set forth in his Appellant's Brief is the main point of the Agreement of July 11, 1975. Its overriding purpose was to assure that he would obtain professional assistance and that he would be certified only by the concurrence of his own physician and the BOARD'S physician.

On the question of alleged coercion, it is respectfully submitted that what the teacher MR. McFERRAN is claiming, in effect, is that he weighed the possible outcome, considered the risk of ultimate dismissal, having met and examined witnesses, face to face, including those who were yet to testify, rather than take the chance of the outcome, he actively sought through

(ARGUMENT, POINT III CONT'D)

counsel to bring a termination to the proceedings. (See Cedar supra, 30 A.D. 2d 882(2) Mot. for lv to appeal den., 22 N.Y. 2d 646)

If the New York Court of Appeals would uphold resignation and denial of hearing of charges based upon a stipulated Agreement to discontinue, in McFerran v. Board-Colonie, 15 N.Y. 2d 630 (1964) affirming 21 A.D. 2d 944, how much more so would the same Court do so at bar where MR. McFERRAN, under said Compromise and Settlement Agreement, not only transformed suspension into sick leave and collected \$15,250.66 in accrued sick leave benefits but refused and still refuses to fulfill his promise of further evaluation by the BOARD'S psychiatrist!

The District Court below perceived the compelling public interest including the rights of the teacher, school children, school officials and the district's taxpayers that would be served by the stipulated Agreement.

Public policy as buttressed by the pinions of constitutional and statutory safeguards must balance all of the competing interests.

The scope of review of the District Court's approval of the settlement Agreement is limited and Appellate Courts will intervene only if there has been an abuse of discretion.

Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F. 2d 767, 771 (2d Cir. 1975), pet. for cert. filed sub nom. Larkin v. Patterson, 44 U.S. Law Week 3069 (July 28, 1975).

(ARGUMENT, POINT III CONT'D)

In Patterson, supra, (514 F. 2d 767 at p. 771)(2d Cir. 1975), the United States Court of Appeals observed:

"The scope of our review of a district court's approval of a settlement agreement is limited.

'(T)he appellate court should intervene only on a clear showing that the trial judge was guilty of an abuse of discretion'

* * *

While the public objectives ... warrant a careful review of the provisions of the settlement in light of those policies, * * *, the clear policy in favor of encouraging settlements must also be taken into account, * * *, particularly in an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals. Nor should we substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in the public interest. * * *" (Citing cases)

(Quoting from Patterson, supra, 514 F. 2d 767 at 771)

In Meetings & Expositions, Inc. v. Tandy Corporation, 490 F. 2d 714, 717 (2d Cir. 1974) (per curiam) it was held that the District Court has the power to enforce on motion a settlement agreement reached in a case that was pending before it, citing T. Kahn & Co. v. Clark, 178 F. 2d 111 and other cases.

The Sixth Circuit, in upholding a "settlement agreement" cites Meetings & Expositions, Inc. v. Tandy Corp., supra (490 F. 2d 714 (2d Cir. 1974) in the case of Aro Corp. v. Allied

(ARGUMENT, POINT III CONT'D)

Witan Co., 531 F. 2d 1368 (6th Cir. 1976).

"Even in those instances in which the court's original jurisdiction may have been questionable, it has jurisdiction over settlement agreements, the execution of which renders the prior controversy academic. Meetings & Expositions, Inc. v. Tandy Corp., 490 F. 2d 714 (2d Cir. 1974)" (quoted from Aro Corp. v. Allied Witan Co., 531 F. 2d 1368, 1371)

It is well established that Courts retain the inherent power to enforce agreements entered in to in settlement of litigation pending before them (see Aro Corp., *supra*, 531 F. 2d 1368, 1371)

In Greenspun v. Bogan, 492 F. 2d 375, 378 (1st Cir. 1974) the appellants contended that the District Court could not have exercised any independent judgment because it lacked sufficient evidence to show fairness of the proposed settlement, but the Court of Appeals held, at p. 379 that:

"*** appellants have failed to show that the District Court clearly abused its discretion in approving the settlement because it lacks sufficient evidence on which an independent appraisal might be based. See West Virginia v. Charles Pfizer Co., *supra*, 440 F. 2d(1079)at 1085. We think that the District Court had ample opportunity to gain familiarity with the subtleties of the proposed settlement."

Referring to the Court's time to read the memoranda and access to the numerous documents and exhibits, the Court of Appeals held that they were well within the "digestive capacity of a judge familiar with the proceedings". (Greenspun v. Bogan, *supra*,

(ARGUMENT, POINT III CONT'D)

492 F. 2d 375, 379)

In the light of the full adversary hearing on Charges afforded to the teacher MR. MCFERRAN, the District Court below notes that no stigma can attach by virtue of the hearings since the BOARD made no determination of the Charges other than agreeing to dismiss them on the merits (See Agreement, par. 10, Addendum this Brief, Record 54-60), noting the case of Gotkin v. Miller, 514 F. 2d 125, 130 (2d Cir. 1975)

The wide scope of review performed by the District Court below is evidenced by its decision as a whole, but the following excerpts are quoted for emphasis: (Appendix 9+, Record 268-274)

Decision " * * * It must be emphasized that this decision will
Page 2 be primarily concerned with the enforcement of the
 Agreement discontinuing this instant litigation.
 However, a limited consideration will be given to
 these constitutional issues, in light of recent
 federal court decisions."

Decision " * * * No allegation is made that plaintiff entered
Page 3 into this Agreement voluntarily. Furthermore,
 it is noted and emphasized that the Agreement was
 negotiated with counsel, competent to my knowledge,
 representing plaintiff and playing a significant
 role in plaintiff's behalf during the proceedings
 involving the Board of Education. * * *"

 " * * * The plaintiff claims in his most recent
 voluminous affidavit, filed February 23, 1976,
 pro se, that even though plaintiff is now represented

(ARGUMENT, POINT III CONT'D)
(EXCERPTS FROM DISTRICT COURT DECISION BELOW CONT'D)

by counsel there was inadequacy and a failure of proper advice by his former counsel, who represented him in prior negotiations and during the hearing pursuant to Section 3020 (sic) of the N.Y. Education Law. The plaintiff says such conduct is responsible for his signing the Agreement. This factor however, is legally insufficient to overturn the Agreement. See Gilbert v. United States, 479 F. 2d 1267 (2d Cir. 1973) (per curiam).

Decision
Page 4 " * * * The Agreement guarantees to plaintiff the right to be reinstated to full teaching responsibilities and tenure upon such certification. The consideration of this Agreement is substantial and, in my judgment, mutual and supports the validity of its terms. * * *

Decision
Page 5 "The essential facts are that charges were brought against the plaintiff by the Superintendent of Schools and Chief Executive Officer of the Enlarged City School District of Troy, New York * * *

" * * * Pursuant to the New York Education Law, Section 3020(a), a hearing was commenced before an impartial hearing officer on June 11, 1975 and continued on several occasions, June 19, June 23 and July 11, 1975 in order that plaintiff could obtain the services of a lawyer. Plaintiff did retain a lawyer finally and pursuant to negotiations at that time between counsel for plaintiff and the attorneys for the other parties, the Agreement was signed by all parties ... * * *

Decision
Page 6 " * * * Such changes were made by the Commissioner of Education of New York and held to be constitutional in conformance with the decision in Kinsella. See

(ARGUMENT, POINT III CONT'D)
(EXCERPTS FROM DISTRICT COURT DECISION BELOW CONT'D)

Hodgkins v. Cent. School District No. 1, 48 A.D. 2d 302 (App. Div. 3rd Dept. 1975). It would thus seem that, while not ruling here on the issue, plaintiff's challenge to the constitutionality of Section 3020 and his request for a three-judge court might well be foreclosed by these previous decisions, and thus 'wholly insubstantial' within the meaning of Goosby v. Osser, 409 U.S. 512 (1973). See also Gonzalez v. Automatic Employees Credit Union, 409 U.S. 90, 100 (1974)." (citation should be 419 U.S. 90, 100)

"The remaining constitutional claim is that plaintiff has been deprived of a property right by losing his tenure and by the allegations to his mental unfitness which were made in the charges to the Board of Education."

"The Agreement rather than stripping plaintiff of tenure not only guarantees his tenure, but also his teaching position upon certification that he is competent to again teach. In terms of the charges of mental unfitness, two points can be made. First, the charges of mental incompetence must be considered dismissed as the Agreement stipulates along with the discontinuance of the Section 3020 proceedings before the Board of Education; thus, no stigma can attach by virtue of the hearings since the Board of Education made no determination of the charges other than agreeing to dismiss them on the merits. See Agreement, para. 10; see also Gotkin v. Miller, 514 F. 2d 125, 130 (2d Cir. 1975), " (Emphasis added)

*** The cases where it was held that charges of mental incapacity amounts to a deprivation of due process involved situations where an opportunity to defend is not afforded to the person accused. See Velger v.

(ARGUMENT, POINT III CONT'D)
(EXCERPTS FROM DISTRICT COURT DECISION BELOW CONT'D)

Cawley, 525 F. 2d 334 (2d Cir. 1975), pet. for cert. filed, 44 U.S. Law Week 3359 (Dec. 8, 1975); Lombard v. Board of Education of City of New York, 502 F. 2d 631, 637 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

The District Court makes its final determination after a careful review:

"The Agreement here was a fair and sensible effort to terminate the numerous proceedings in which the plaintiff and the defendants were engaged, in this court, the courts of New York State,⁽¹⁾ and primarily before the Board of Education."

The Court gives its approval of the Agreement and applies its stipulated discontinuance as follows:

"In sum, the separate motions of the defendants are granted dismissing the complaint pursuant to the terms of the Agreement that agreed to its discontinuance. The plaintiff's request for the convening of a three-judge court is similarly denied along with the dismissal of the complaint.

It is so Ordered.

Dated: February 26, 1976

Albany, New York

s/James T. Foley
UNITED STATES DISTRICT JUDGE"

(Footnote:

(1) At that time there were no State Court actions, but rather the appeal 10416 before the Commissioner and the decided appeals before the Commissioner, Decisions No. 9032 and No. 9033 dated June 9, 1975.)

(ARGUMENT, POINT III CONT'D)

As the District Court noted on Page 3 of its Decision (Appendix 9+, Record 268-274 the fact that the action filed in the District Court was one involving constitutional rights

"alters neither the ability of the parties to settle the action or the ability of the plaintiff to waive further litigation on alleged violation of his constitutional rights. Cf. United States v. Armedo-Sarmiento, 524 F. 2d 591 (2d Cir. 1975) (per curiam)"

The District Judge noted the teacher MR. McFERRAN'S discharged counsel was competent to his knowledge (Decision, P. 3, Appendix 9+)

In Gilbert v. United States, 479 F. 2d 1267 (2d Cir. 1973) the United States Court of Appeals held that where settlement is agreed upon among clients and counsel, the terms are conveyed to the Court by counsel and judgment entered accordingly, the judgment may not be set aside on the complaint of one party that his counsel coerced him. In the Gilbert case, supra, 479 F. 2d 1267, the Court observed, at Page 1268:

"The findings below that the settlement was expressly authorized are supported by the evidence and not clearly erroneous. Fed. R. Civ. P. 52(a). Even if appellant had a claim against his own counsel for coercion or overbearing, this would not permit the settlement, one which is not claimed to have been unfair, here to be overturned. McKenzie v. Boorhem, 117 F. Supp. 433, 435 (W.D. Ark 1954); Smith v. Washburn & Condon, 38 Ariz. 149, 297 P. 879 (1931)

(ARGUMENT, POINT III CONT'D)

Gilbert, supra, 479 F. 2d 1267 at Page 1268 continued

("...where express authority is given, the attorney may compromise any matter, and his action in so doing is binding upon his principal"); * * * (citing cases) 'Fair settlements are in the interest of the men, as well as of the employers'

(Quoted from Gilbert, supra, 479 F. 2d 1267 at p. 1268 (2d Cir. 1973)).

See Antinore v. State et al, November 16, 1976, 40 N.Y.

2d ___ affirming (except for need for importing certain procedural safeguards) 49 A.D. 2d 6 (see p. 10) 4th Dept.

Parenthetically, it is noted in response to MR. McFERRAN'S mention of a PERB hearing officer's decision (Case U-1790 dated December 4, 1975) against the BOARD of EDUCATION on increments (Record 260-264) that such decision by the hearing officer was reviewed by PERB (Public Employers Relations Board) which remanded the case to the hearing officer to obtain a complete record and reconsider his decision in the light of that record.

(PERB Board Decision and Order dated April 27, 1976, Case #U-1790).

As to the teacher's argument attacking the alleged unconstitutionality of 3020-a and of the Agreement itself because, in effect, the BOARD and/or its agents would act as prosecutor, judge and jury, the United States Supreme Court has reviewed this argument in Hortonville Joint School District #1 v. Hortonville Education Association, ___ U.S. ___, 96 S. Ct

(ARGUMENT, POINT III CONT'D)

2308, 49L.Ed. 1 (June 17, 1976) and overruled it where

49L.Ed 1 "Respondents have failed to demonstrate that
at p. 11 the discussion to terminate their employment was
infected by the sort of bias that we have held
to disqualify other decisionmakers as a matter of
federal due process. A showing that the Board
was 'involved' in the events pending this decision,
in light of the important interest in leaving with
the Board the power given by the state legislature
is not enough to overcome the presumption of
honesty and integrity in policymakers with decision-
making power Cf Withrow v. Larkin, 421 U.S. 35, 47,
43 L.Ed. 2d 712, 95 S. Ct 1456 (1975). Accordingly
we hold that the Due Process Clause of the Fourteenth
Amendment did not guarantee respondents that the
decision to terminate their employment would be made
or reviewed by a body other than the School Board."
(Hortonville, supra, 49L.Ed 1, at p. 11, 12)

(The above decision was also cited by the Appellate
Division, Fourth Department, in Matter of Grace Amos v.
Board of Education of Cheektowaga, Sloan Union Free School
District, decided November 12, 1976, Index No. 712/1976 in
which the Appellate Division stated "For like reasons we find
no merit in petitioner's due process argument", citing reference
to Matter of Jerry v. Board of Educ., 50 A.D. 2d 149, 161, and
citing Cf, Hortonville supra.

At bar there was no decision to terminate but rather a
decision determining probable cause of the 3020-a charges on
May 5, 1975 and a subsequent decision on July 15, 1975 author-
izing, approving and adopting the Compromise and Settlement Agree-
ment of July 11, 1975. As the District Judge found,

(ARGUMENT, POINT III CONT'D)

"* * * Although plaintiff makes allegations that the Board of Education intends to violate this Agreement and not to honor its promises in good faith, absolutely no indication of a basis and fact for this assertion has been shown. Indeed, plaintiff has refused to submit to an examination by the psychiatrist for the Board of Education as called for by the Agreement, yet asserts that the psychiatrist intends never to certify him to teach again under the terms of the Agreement."

The following quotation is cited with approval in a United States Supreme Court case. It is submitted not on the question of any pending charge against the teacher -- since the Agreement as upheld by the District Court below operates to discontinue said Charges on the merits. Rather it is cited to reflect the propriety of bringing charges and specifications of conduct unbecoming a teacher with respect to an employee making false and rash accusations:

In Meehan v. Macy, 129 U.S. App. D.C. 217, 392 F. 2d 822, 835 (1968), modified, 138 U.S. App. D.C. 38, 425 F. 2d 469, aff'd en banc 138 U.S. App. D.C. 41, 425 F.2d 472 (1969), cited with approval in Arnett v. Kennedy, 416 U.S. 134, 161-62 (1974), the Court stated at p. 835 of 392 F.2d 822:

"Moreover, it is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of

(ARGUMENT, POINT III CONT'D)

Meehan v. Macy,, 392 F. 2d 822 at Page 835 cont'd

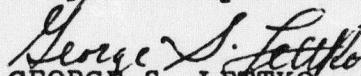
codes that define prohibited conduct of employees includes "catchall" clauses prohibiting employee "misconduct", "immorality", or "conduct unbecoming". We think it is inherent in the employment relationship as a matter of common sense if not common law that an employee in appellant's circumstances cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory lampoons. We believe that Meehan cannot fairly claim that discharge following an attack like that presented by this record comes as an unfair surprise or is so unexpected and uncertain as to chill his freedom to engage in appropriate speech."

(Cf. Specifications of Charges II and III in Record, 140-145 with Agreement in Addendum, this Brief, p. 8, in Record 58, 54-60.)

CONCLUSION

Since The Agreement Is Valid And The District Court Properly Examined, Approved And Applied It The Order And Judgment Below Should Be Affirmed.

Respectfully submitted,


GEORGE S. LETTKO
Attorney For Appellee
BOARD OF EDUCATION
Office Address
5 First Street
Troy, New York 12180
Telephone: (518) 273-8152

ADDENDUM

INDEX TO ADDENDUM

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SETTLEMENT AGREEMENT

THE ENLARGED CITY SCHOOL DISTRICT OF TROY, NEW YORK

In the Matter of Charges

-against-

ALBERT E. McFERRAN, JR.,

COMPROMISE AND
SETTLEMENT
AGREEMENT

A tenured Teacher.

MADE on this 11th day of July, 1975

BETWEEN ALBERT E. McFERRAN, JR., a tenured teacher of
The Enlarged City School District of Troy, New York, residing at
131 Clermont Street, Albany, New York 12203, herein called
"McFerran,"

AND THE BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL
DISTRICT OF TROY, NEW YORK, having its offices at 1950 Bordett
Avenue, Troy, New York, 12180, herein called "Board"

WITNESSETH THAT

WHEREAS Mr. McFerran is the respondent in proceedings
brought under section 3020-a of the Education Law in certain
Charges and Specifications filed on May 5, 1975, as to which the
Board had determined probable cause under section 3020-a(2) on
May 5, 1975, and a public hearing of such charges having commenced
on June 11, 1975, and continued on June 19 and June 23, 1975, and
then adjourned to continue on July 11 and 12, 1975, after Mr.
McFerran on June 23, 1975, moved for two week adjournment to ob-
tain counsel; and Michael G. Breslin, Esq., of Albany, New York,

EXHIBIT "I" (ADDENDUM-58 RECORD-54)

SETTLEMENT AGREEMENT CONT'D

having been retained by Mr. McFerran as his attorney and having entered into negotiations with the Board's attorney George S. Lettko, Esq. and with Sidney L. Johnson, Superintendent of Schools being the complainant who filed said charges; and a compromise and settlement having been agreed upon subject to enactment by the Board of a formal resolution authorizing the same, and it being expressly intended that this instrument shall constitute such compromise and settlement;

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES AND PERFORMANCES HEREIN SET FORTH AND OF THE SUBSCRIPTION HERETO OF THE PARTIES, IT IS HEREBY FORMALLY AND SOLEMNLY STIPULATED AND AGREED BY AND BETWEEN MCFERRAN AND THE BOARD AND THEIR RESPECTIVE UNDERSIGNED ATTORNEYS AS FOLLOWS:

1. Mr. McFerran shall submit to an immediate psychiatric evaluation and, if indicated, to treatment by Dr. Henry A. Camperlengo or other psychiatrist of his choice, at his own expense, and to further evaluation by the Board's medical examiner, Dr. Walter A. Osinski, psychiatrist, or other substitute or successor medical examiner appointed by the Board, in the event Dr. Walter A. Osinski is unable to perform his duties as the Board's medical examiner, to determine McFerran's mental capacity to perform his duties as a tenured teacher in the Troy school system.

2. Upon completion of the aforesaid psychiatric evaluation and determination by McFerran's psychiatrist and the Board's

SETTLEMENT AGREEMENT CONT'D

said medical examiner and a determination by them that Mr. McFerran has the requisite mental capacity to perform his duties as such tenured teacher and upon the Board's receipt of written certification by Mr. McFerran's psychiatrist and by the Board's psychiatrist (Dr. Osinski aforesaid or other substitute or successor examiner appointed by the Board) that Mr. McFerran has the mental capacity to perform his duties as such tenured teacher, Mr. McFerran shall be reinstated fully by the Board to the performance of his duties as a tenured teacher in his tenure area in the Troy school system.

If such certification by either Mr. McFerran's psychiatrist or the Board's psychiatrist is conditioned upon future treatment such treatment shall be continued by Mr. McFerran as a condition of certification and reinstatement to duty.

3. Pending the determination and certification by Mr. McFerran's psychiatrist and the Board's psychiatrist as aforesaid that Mr. McFerran has the mental capacity to perform his duties as such tenured teacher, Mr. McFerran is hereby and on his own application placed on sick leave effective immediately with actual sick leave benefits payable during the regular school year commencing September, 1975, and chargeable to his accrued sick leave.

4. Mr. McFerran's civil action entitled Albert E. McFerran, Jr. against the Board of Education for the Enlarged City

SETTLEMENT AGREEMENT CONT'D

School District of Troy, New York and Ewald Nyquist, Commissioner of Education of the State of New York (Civil Action No. 75-CV-265) now pending in the United States District Court, Northern District of New York, shall be immediately discontinued on the merits and with prejudice, without costs.

5. Mr. McFerran's appeal and petition to the Commissioner of Education of the State of New York dated January 31, 1975, alleging improper suspension on January 8, 1975, and known as Appeal No. 10416, together with any related grievance shall be immediately discontinued by Mr. McFerran on the merits and with prejudice.

6. Mr. McFerran hereby represents that he has no other action pending against the Board, its agents, servants or employees nor against the said Commissioner of Education, other than as herein stated.

7. Mr. McFerran shall make, execute, acknowledge and deliver valid releases in favor of all the officers, agents and employees of the Enlarged City School District of the City of Troy, New York, the Board of Education thereof and all members of the Board past and present, and the Commissioner of Education of the State of New York, and Arthur F. McGinn, Jr., Esq., George S. Lettko, Esq., and Dr. Walter A. Osinski releasing and forever discharging them in the conventional type general release from any and all claims in law or equity, past, present or future which Mr.

SETTLEMENT AGREEMENT CONT'D

McFerran may have against ~~seis~~ persons or parties arising from any matter, cause of thing directly or indirectly related to the pending 3020-a proceedings or any of the charges, specifications or subject matter thereof or directly or indirectly related to any of Mr. McFerran's appeals to the Commissioner of Education of the State of New York or the subject matter thereof.

8. Mr. McFerran shall in writing retract and withdraw all accusations of criminal and illegal activity and hoax alleged against Mr. Dudley P. Van Arnam, Mr. Arthur F. McGinn, Jr., Mr. Sidney L. Johnson, Dr. Walter A. Osinski, George S. Lettko, Thelma J. Riggs, William J. McLoughlin, Honorable Malcolm Wilson, Daniel Klepak, Robert D. Stone, Commissioner Ewald B. Nyquist and the Board of Education of The Enlarged City School District of Troy, New York.

9. Mr. McFerran declares that he does not contest the charges in the instant 3020-a proceedings made against him.

10. Said instant 3020-a proceedings shall be discontinued and terminated on the merits with prejudice immediately subject to be reopened in the event of breach of this compromise and settlement agreement by Mr. McFerran.

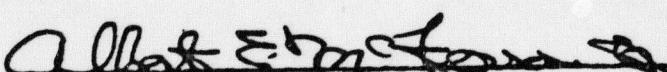
11. That except as otherwise required by law or as otherwise required for lawful and proper functioning of the Board, its agents or employees, none of the records relating to this proceeding shall be disclosed or otherwise made public. But nothing

SETTLEMENT AGREEMENT CONT'D

herein shall be construed to preclude the Board, its agents or employees from public disclosure of any such record in order to respond to any public statement or writing which Mr. McFerran might make, if any, relating to the subject matter of this proceeding which has been held as a public hearing at the express request of Mr. McFerran.

12. The Board and Mr. McFerran hereby agree to submit to the Rensselaer County Supreme Court any dispute which may arise from the interpretation, or relating to the carrying out of this compromise and settlement agreement or to the performances set forth herein; and more particularly any such dispute shall be submitted pursuant to the "New York Simplified Procedure for Court Determination of Disputes" as provided in Civil Practice Law and Rules 3031 thru 3037, and the Board and Mr. McFerran hereby waive a jury trial in any such dispute.

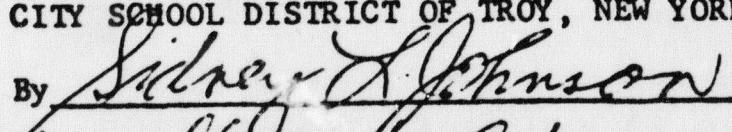
IN WITNESS WHEREOF, Mr. McFerran and the Board have signed and sealed or caused this instrument to be signed and sealed with their respective hand and seal.

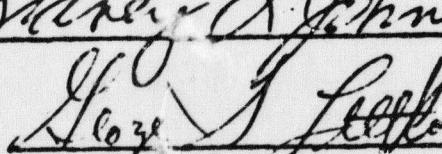

Albert E. McFerran, Jr. L.S.

seal


Michael G. Breslin
Attorney for Albert E.
McFerran, Jr.
90 State Street
Albany, New York 12207

THE BOARD OF EDUCATION OF THE ENLARGED
CITY SCHOOL DISTRICT OF TROY, NEW YORK

By 


George S. Lettiko
Attorney for the Board
5 First Street
Troy, New York 12180

SETTLEMENT AGREEMENT CONT'D

STATE OF NEW YORK
COUNTY OF ALBANY ss:

On this 11th day of July, nineteen hundred and seventy-five, before me the subscriber personally appeared Albert E. McFerran, Jr., Sidney L. Johnson, Michael G. Breslin and George S. Lettko to me personally known and known to me to be the same persons described in and who executed the within compromise and settlement agreement, and they duly acknowledged to me that they executed the same.

James S. Wall

(ADDENDUM-64 RECORD-60)

(ADDENDUM CONT'D)

TEXT OF SECTION 913 OF THE EDUCATION LAW

"§913. Medical examinations of teachers and other employees

In order to safeguard the health of children attending the public schools, the board of education or trustees of any school district or a board of cooperative educational services shall be empowered to require any person employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician of his choice or school medical inspector of the board of education or trustees or board of cooperative educational services, in order to determine the physical or mental capacity of such person to perform his duties. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the board of education or trustees or board of cooperative educational services and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

As amended L. 1973, c.22, §1"

(ADDENDUM CONT'D)

TEXT OF SECTION 3020-a, EDUCATION LAW OF NEW YORK

"§3020-a. Hearing procedures and penalties

1. **Filing of charges.** Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. **Disposition of charges.** Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within ten days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desires a hearing on the charges. The inexcused failure of the employee to notify the clerk of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. **Hearings.**

a. **Notice of hearing.** Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

(ADDENDUM CONT'D)

TEXT OF SECTION 3020-a, EDUCATION LAW OF NEW YORK CONT'D

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

(ADDENDUM CONT'D)

TEXT OF SECTION 3020-a, EDUCATION LAW OF NEW YORK CONT'D

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

(ADDENDUM CONT'D)

EXCERPTS FROM SECTIONS 2503, 2508, 2509, 3012
OF THE EDUCATION LAW OF NEW YORK

The Enlarged City School District of Troy is governed in great part by Article 51, Sections 2501, 2531 of the Education Law.

"§2503. Powers and duties of board of education

Subject to the provisions of this chapter, the board of education:

1. Shall perform any duty imposed upon or exercise any power granted to boards of education of city school districts or union free school districts or trustees of common school districts under this chapter or other statutes, or the rules of the regents and regulations of the commissioner of education so far as they may be applicable to the school or other educational affairs of a city school district, and not inconsistent with the provisions of this article.
* * *

"§2508. Powers and duties of superintendent of schools

The superintendent of schools of a city school district shall possess, subject to the bylaws of the board of education, the following powers and be charged with the following duties:

1. To be the chief executive officer of the school district and the educational system, and to have a seat on the board of education and the right to speak on all matters before the board, but not to vote.
2. To enforce all provisions of law and all rules and regulations relating to the management of the schools and other educational, social and recreational activities under the direction of the board of education.
* * *

5. To have supervision and direction of associate, assistant and other superintendents, directors, supervisors, principals, teachers, lecturers, medical inspectors, nurses, auditors, attendance officers, janitors and other persons employed in the management of the schools or the other educational activities of the district authorized by this chapter and under the direction and management of the board of education; to transfer teachers from one school to another, or from one grade of the course of study to another grade in such course, and to report immediately such transfers to such board for its consideration and action; to report to such board violations of regulations and cases of insubordination, and to suspend an associate, assistant or other superintendent, director, supervisor, expert, principal, teacher or other employee until the next regular meeting of such board, when all facts relating to the case shall be submitted to such board for its consideration and action.
* * *

(ADDENDUM CONT'D)

EXCERPTS FROM SECTIONS 2503, 2508, 2509, 3012 CONT'D

"§2509. Appointment of assistant and other superintendents, teachers and other employees

2. At the expiration of the probationary term of any persons appointed for such term, or within six months prior thereto, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. By a majority vote the board of education may then appoint on tenure any or all of the persons recommended by the superintendent of schools. Such persons and all others employed in the teaching service of the schools of such school district who have served the full probationary period shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a of such law. Failure to maintain certification as required by this chapter and the regulations of the commissioner of education shall constitute cause for removal.

***"

"§3012. Tenure: certain union free school districts

2. ***

Such persons, and all others employed in the teaching service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; (c) failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. ***"

(ADDENDUM CONT'D)

TEXT OF PART 82 OF THE REGULATIONS OF
THE COMMISSIONER OF EDUCATION

Pursuant to Sections 207 and 3020-a
of the Education Law

As it existed at the time of the teacher's
hearing commencing June 1975

See 8 NYCRR 82.1-82.11

PART 82

HEARINGS OF CHARGES AGAINST EMPLOYEES ON TENURE

Section 82.1 Definitions. (a) As used in this Part:

(1) "Employee" means any person or persons against whom charges may be filed pursuant to section 3020-a of the Education Law.

(2) "Chief school administrator" means either the superintendent of schools or the principal of the school district employing a person against whom charges are made.

(3) "Complainant" means the person preferring the charges.

(4) "Board" means trustee, board of trustees, board of education or board of cooperative educational services.

(5) "Commissioner" means Commissioner of Education.

82.2 Filing of charges. (a) Charges may not be filed against an employee more than five days before the next regularly scheduled meeting of the board except with the permission of the board.

(b) A copy of written statement of each charge as to which the board finds that probable cause exists, together with a copy of the vote of each member of the board on each such charge, shall be forwarded at once to the Commissioner by first class mail.

(c) Charges against an employee must be made separately from charges against any other employee.

82.3 Requests for hearings. (a) A notification to the Commissioner of the need for a hearing shall contain at least the following information:

(1) A copy of the charges and all other information forwarded to the employee and an affidavit of service of a copy of such charges upon the employee.

(2) The name of the panel member selected by the board.

(3) The place to be provided by the board for the holding of the hearing.

(ADDENDUM CONT'D)

(4) The name and address of the attorney, if any, who will represent the complainant at the hearing.

(b) If the board shall fail to notify the Commissioner of its selection of a panel member and the employee has not waived his right to a hearing, the Commissioner shall select the member of the hearing panel for the board.

(c) At the same time that the notification is sent to the Commissioner the board shall by certified mail send to the employee the information provided in paragraphs (2), (3) and (4) of subdivision (a) of this section.

(d) Separate notification of the need for a hearing shall be given with respect to each employee against whom charges have been filed.

(e) Whenever an employee shall be deemed to have waived his right to a hearing by his unexcused failure to request a hearing within ten days after receipt of a written statement of the charges against him, the clerk of the board shall immediately file notice of such waiver with the Commissioner.

82.4 Hearing Officers. As promptly as possible after receipt of notification of the need for a hearing, the Commissioner will advise each party as to the date, time and place of the hearing, the identity of the hearing officer, who shall not be a member of the panel, designated by the Commissioner to conduct the hearing, and the procedures to be followed in selecting the hearing panel.

82.5 Panel Members. (a) Panel members will be appointed by the Commissioner from time to time, and their names and other pertinent information will be furnished to each board except those in the City of New York.

(b) Copies of each list of panel members appointed by the Commissioner shall be filed in the office of the school district clerk and shall be available for public inspection.

(c) The name of any panel member may be removed from a list at any time by the Commissioner at his discretion.

(d) No person may be selected from a list to serve as a panel member when that person is serving as a panel member in connection with charges being heard against another employee.

82.6 Selection of hearing panel member by the employee.

(a) Within five days after receiving the copy of the notification to the Commissioner of the need for a hearing, the employee shall, in writing by certified mail, notify the board and the Commissioner of the name of his selection for the hearing panel. If the employee shall fail to notify the Commissioner and the board as required, and the employee has not waived his right to a hearing, the Commissioner shall select the member of the hearing panel for the employee.

82.7 Selection of third hearing panel member. (a) Not less than five days before the date scheduled for the hearing the panel members chosen by the board and the employee shall by certified mail or telegram advise the Commissioner of the name of the person chosen as the third panel member, or that no agreement as to a third member has been reached.

(b) If such notice is not received by the Commissioner at least three days before the date scheduled for the hearing he shall select the third panel member.

82.8 Witnesses. At the time set for the commencement of the hearing, the parties will present to the hearing officer copies of any subpoenas served on prospective witnesses.

82.9 Demand for public hearing. (a) Unless the employee or his attorney shall have served a written demand for a public hearing upon the hearing officer, or if no hearing officer has yet been designated, upon the Commissioner, at least five days before the date set for the hearing, the employee will be deemed to have waived his right to a public hearing and the hearing will be private.

82.10 Conduct of hearings. (a) Cine photographs, still photographs, videotape recordings and audiotape recordings may not be taken at private hearings, and may be taken at public hearings only when permitted by the hearing officer.

(b) Public hearings shall be open to members of the public and to representatives of the news media, except that the hearing officer may, in his discretion, exclude any persons other than parties, witnesses, and their attorneys from all or any portion of the hearing where such exclusion is warranted for the protection of the privacy or reputation of any person under the age of eighteen years. (Effective February 14, 1975)

(c) The hearing officer shall have the power to adjourn the hearing from time to time as required.

(d) The hearing officer shall decide all motions and objections, but he may not dismiss the charges without the consent of the complainant or his attorney.

(e) If the hearing officer determines that the absence of a hearing panel member is likely to delay unduly the prosecution of the hearing, he shall order the replacement of such panel member. If the party who selected such panel member fails to select a replacement within two days, the commissioner shall select such replacement. If the panel member to be replaced is the third member, and if the hearing officer determines that the panel members selected by the parties cannot agree on a replacement, the commissioner shall select a replacement. In no event shall a hearing proceed except in the presence of three panel members.

(f) Members of the hearing panel may question witnesses and parties, subject to the right of the hearing officer to disallow such questions if he deems them improper. No questions may be addressed to the employee unless he has been sworn as a witness with his own consent.

(g) At the conclusion of the testimony, the hearing officer may adjourn the hearing to a specified date not more than 14 days after the conclusion of the testimony, to permit preparation of the transcript, submission by the parties of memoranda of law, and deliberation by the panel members. The hearing officer shall provide for the preparation and delivery of one copy of the transcript of the hearing to each panel member and to the employee, if requested. The complainant and the board may order copies of the transcript directly from the stenographer.

(h) The findings of the panel on each charge, and the recommendations of the panel as to disciplinary action, if any, against the employee shall be submitted to the hearing officer, together with the panel members' copies of the transcript, no later than the adjourned date of the hearing. Upon receipt of such findings and recommendations, the hearing officer shall declare the hearing concluded, and shall forward the findings and recommendations, together with the three copies of the transcript, to the Commissioner. The Commissioner shall forward a report of the hearing panel and their recommendations as to the penalty if one is warranted, together with a copy of the transcript of the proceedings before the hearing panel to the employee and to the clerk of the employing board.

82.11 Decision of the board. The decision of the board of education shall be based solely upon the record in the proceedings before the hearing panel, and shall set forth the reasons and the factual basis for the determination.

UNITED STATES COURT OF APPEALS
for the Second Circuit

ALBERT E. MCFERRAN, JR. (PRO SE),

Plaintiff-Appellant

-against-

BOARD OF EDUCATION FOR THE ENLARGED CITY
SCHOOL DISTRICT OF TROY, NEW YORK, and
EWALD B. NYQUIST, COMMISSIONER OF EDUCATION
OF THE STATE OF NEW YORK,

Defendants-Appellees

Appeal From The United States District
Court For The Northern District of
New York, 75-CV-265

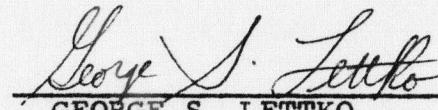
AFFIDAVIT OF SERVICE OF APPELLEE
BOARD OF EDUCATION'S BRIEF

STATE OF NEW YORK)
COUNTY OF RENSSELAER)^{ss.}

I, George S. Lettko, being duly sworn, do depose and say
that I am attorney for the Appellee BOARD OF EDUCATION having my
offices at 5 First Street, Troy, New York 12180.

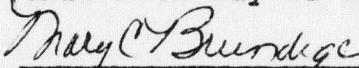
That on December 23, 1976 I personally served two copies
of Appellee BOARD OF EDUCATION'S brief in the above appeal upon
Assistant Attorney General John Q. Driscoll at The Capitol,
Office Number 123, Albany, New York by personally delivering said
two true copies thereof and handing the same to said Mr. Driscoll
and leaving them with him, he being the Assistant Attorney
General handling this matter on behalf of Honorable Louis J.
Lefkowitz, Attorney General, attorney for Appellee EWALD B.
NYQUIST, Commissioner of Education of the State of New York.

That on December 27, 1976 I served two true copies of Appellee BOARD OF EDUCATION's brief by mail upon the Appellant Pro Se ALBERT E. McFERRAN, JR. by depositing the same in a postpaid wrapper duly addressed to said ALBERT E. McFERRAN, JR., at 131 Clermont Street, Albany, New York 12203, in the Post Office at Troy, New York, his said address being the last address mentioned on papers served upon the undersigned in this matter or the place where he resides according to the best information that can be conveniently obtained.



GEORGE S. LETTKO
Attorney for Appellee
BOARD OF EDUCATION

Sworn to before me
this 27th day of December 1976:



Mary C. Brundage
Notary Public, State of New York

MARY C. BRUNDAGE
Notary Public, State of New York
Qualified in Albany County
Commission expires March 30, 1978